No. 11404

In the United States Circuit Court of Appeals for the Ninth Circuit

EDWARD C. COMMERS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA, HELENA DIVISION

BRIEF FOR THE APPELLEE

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STATEMENT

This is an action for a declaratory judgment brought by the appellant against the United States upon the theory that when appellant was drafted for military service his body, which was his private property was taken by the Government, and that he is entitled to just compensation therefor, under the Fifth Amendment to the Constitution. Jurisdiction is sought to be invoked under the Fifth Amendment, appellant alleging that no consent to sue, other than that implied in the Fifth Amendment, is necessary (R. 14). The petition contained a prayer for a declaratory judgment construing the Constitution and adjudging (1) that the taking of petitioner's body and

its earning power for military service was a taking of private property for public use; (2) that the United States is obligated to make just compensation to petitioner and all other veterans disabled in war; (3) that petitioner and all other such war disabled have a Constitutional right to fully try their claims for bodily impairment in District Courts of the United States; (4) that the United States has consented to be sued upon these claims, and (5) for further relief (R. 15–16).

A motion to dismiss was filed by the United States, upon the grounds (1) that the amended petition for declaratory judgment failed to state a claim against the respondent upon which relief could be granted, and (2) that the court was without jurisdiction to hear and determine the cause, for the reason that the United States has not consented to such suit (R. 17). The motion was granted (R. 34), the lower court rendering an opinion (R. 18–34), holding that appellant's contention, that military service in time of war constitutes a taking of private property without just compensation in violation of the Fifth Amendment to the Constitution, was without merit, and that the court lacked jurisdiction to entertain the action. Judgment of dismissal was entered July 29, 1946 (R. 35), and notice of appeal filed August 1, 1946 (R. 37).

On this appeal the United States contends that the action was properly dismissed for the reasons fully set forth in the lower court's opinion (R. 18–34).

ARGUMENT

I

The Congress has the power, under the Constitution, to declare and wage war, and, in the exercise of this power, may conscript the citizenry needed for this purpose without regard to the individual citizen's pecuniary interests, and, hence, the appellant has failed to state a cause of action upon which relief may be granted

One of the paramount powers conferred by the Constitution upon the Congress is the power to declare and wage war, and, in the exercise of this power, Congress clearly has the right to conscript citizens for military service. *Selective Draft Law Cases,* 245 U. S. 366; *United States* v. *Macintosh,* 283 U. S. 605; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Hirabayashi* v. *United States,* 320 U. S. 81, 93; *Tatum* v. *United States,* 146 F. (2d) 406 (C. C. A. 9th); *Hopper* v. *United States,* 142 F. (2d) 181 (C. C. A. 9th); *Local Draft Board No. 1 of Silver Bow County, Montana,* v. *Connors,* 124 F. (2d) 388 (C. C. A. 9th). In *Selective Draft Law Cases, supra,* the Supreme Court stated (p. 377):

> The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "to declare war; * * * to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; * * * to make rules for the government and regulation of the land and naval forces" Article I,

> § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" Article I, § 8.
>
> As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice. * * *.

And, as stated by the Supreme Court in *United States* v. *Macintosh, supra* (p. 622):

> The Constitution, therefore, wisely contemplating the ever-present possibility of war, declares that one of its purposes is to "provide for the common defense." In express terms Congress is empowered "to declare war," which necessarily connotes the plenary power to wage war with all the force necessary to make it effective; and "to raise * * * armies," which necessarily connotes the like power to say who shall serve in them and in what way.

Also, as stated by this court in *Tatum* v. *United States, supra* (p. 407):

> The right of Congress to impose upon our citizenry the burden of serving in the armed forces is not questioned. The Supreme Court * * * makes clear the power of Congress to enlist the manpower of the nation for the prosecution of war and to subject to military service both the willing and the unwilling. * *. *.

This power is not limited or restricted, or conditioned upon the payment of just compensation, under the Fifth Amendment, as the appellant contends. *Jacobson* v. *Massachusetts, supra; United States* v. *Macintosh, supra; Weightman* v. *United States,* 142 F. (2d) 188 (C. C. A. 1st); *Kramer* v. *United States,* 147 F. (2d) 756 (C. C. A. 6th). In *Jacobson* v. *Massachusetts, supra,* the Supreme Court said (p. 29):

> The liberty secured by the Fourteenth Amendment, this court has said, consists, in part, in the right of a person "to live and work where he will," *Allgeyer* v. *Louisiana,* 165 U. S. 578; and yet he may be compelled, by force if need be against his will and *without regard to his personal wishes or his pecuniary interest,* or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense. * * *. [Italics supplied.]

Also, as stated by the Circuit Court of Appeals for the First Circuit, in *Weightman* v. *United States, supra* (p. 191):

> In view of the breadth of the war power as indicated by the above cases and the cases cited therein, we have no doubt that the system devised for the treatment of persons who by reason of religious training and belief are conscientiously opposed to participation in war in any form does not deprive them of any of their constitutional rights even though, in practical effect, it deprives them of their full liberty and *requires them to work at a rate of compensation far below what could be earned in civilian*

> *life and even below what could be earned in the armed forces.* [Italics supplied.]

The duty of citizens to render military service when necessary to defend the Government against its enemies is well recognized. *Selective Draft Law Cases, supra; United States* v. *Macintosh, supra; Jacobson* v. *Massachusetts, supra.* In *Selective Draft Law Cases, supra,* the Supreme Court said (p. 378):

> It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, Law of Nations, Book III, c. 1 & 2. To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force. * * *

Again, as stated by the Supreme Court in *United States* v. *Macintosh, supra* (p. 620):

> That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.

Appellant's contention that when he was taken into the Army he became a slave or serf and was subjected to involuntary servitude, in violation of the Thirteenth Amendment, is plainly without merit. *Selective Draft Law Cases, supra; Hopper* v. *United States, supra,* p. 186; *Kramer* v. *United States, supra.* In disposing of this contention, in *Selective Draft Law Cases, supra,* the Supreme Court said (p. 390):

> Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.

Also, as stated by this court in *Hopper* v. *United States, supra* (p. 186):

> Appellant attacks the Selective Service Act as unconstitutional on the ground that it prohibits the free exercise of religion, deprives appellant of liberty and property without due process, and condemns him to involuntary servitude not as punishment for crime. Also that the Act delegates legislative powers. These propositions, in one guise or another, have been advanced again and again, both in this and in the first World War, and have uniformly met with rejection. * * *.

II

The United States has not consented to be sued to enforce a claim for compensation for military service and the court lacked jurisdiction

The United States has not consented to be sued in a case of this character and the court plainly lacked jurisdiction. *Lynch* v. *United States,* 292 U. S. 571; *Reid* v. *United States,* 211 U. S. 529; *Schillinger* v. *United States,* 155 U. S. 163; *Coleman* v. *United*

States, 100 F. (2d) 903 (C. C. A. 6th). As stated by the Supreme Court in *Lynch* v. *United States, supra* (pp. 581–582):

> The rule that the United States may not be sued without its consent is all embracing.
>
> * * * * *
>
> The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, *DeGroot* v. *United States,* 5 Wall. 419, 431; *United States* v. *Babcock,* 250 U. S. 328, 331; and to those arising from some violation of rights conferred upon the citizen by the Constitution, *Schillinger* v. *United States,* 155 U. S. 163, 166, 168. * * *. For immunity from suit is an attribute of sovereignty which may not be bartered away.

In *Schillinger* v. *United States, supra,* the Supreme Court said (p. 166):

> The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government.

Also, as pointed out by the lower court in disposing of appellant's contention that the court has jurisdiction by virtue of the Fifth Amendment, Federal Dis-

trict Courts have only such jurisdiction as Congress may give them, and they have not been vested with jurisdiction to entertain suits of this character. *Lockerty* v. *Phillips,* 319 U. S. 182.

Finally, as the lower court has pointed out, Congress has created rights against the United States for disabilities contracted in the military service in the enactment of the World War Veterans' Act (38 U. S. C. 421, et seq.) and similar legislation, and, in so doing, was under no obligation to provide a remedy in the courts. *Lynch* v. *United States, supra.* Suits upon compensation claims may not be maintained. *Silberschein* v. *United States,* 266 U. S. 221; *Crouch* v. *United States,* 266 U. S. 180.

CONCLUSION

As the appellant failed to state a cause of action and the court was without jurisdiction, it is respectfully submitted that the judgment of dismissal should be affirmed.

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